

HEARING DECISION

Petitioner:

[REDACTED]

Petitioner's Address:

[REDACTED]

Phoenix, AZ 85042

Petitioner's Parents:

[REDACTED]

Phoenix, AZ 85042

Respondent:

Roosevelt Elementary School District
6000 S. 7th Street
Phoenix, AZ 85501

Respondent's Representative:

Denise Bainton, Attorney at Law
DeConcini, McDonald, Yetwin & Lacy
2525 E. Broadway Blvd., Suite 200
Tucson, AZ 85716

Petitioner's Representative:

[REDACTED]

Legal Guardian

Impartial Hearing Officer:

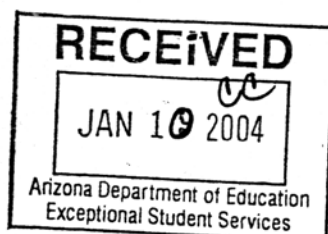
Harold J. Merkow
1102 W. Glendale Ave. #116
Phoenix, AZ 85021

Dates of Hearing:

December 6, 2004

Date of Decision:

December 17, 2004



05-019

This matter came on for hearing on December 6, 2004 to consider the due process hearing request submitted on October 17, 2004 by Petitioner's grandmother/legal guardian. The purpose of the hearing was to consider the due process hearing request of Petitioner's grandmother/guardian seeking an order directing the Respondent School District to place Petitioner in a special education program at a private provider (Upward Foundation). Petitioner's grandmother/guardian appeared in person and represented herself. Respondent school district was represented by Denise Bainton, Attorney at Law.

Petitioner's grandmother/guardian is seeking a due process hearing to have Petitioner placed in a private program for kindergarten and beyond. Having heard the testimony of the witnesses, having read and considered the exhibits admitted into evidence, having considered argument of the parties and being fully advised in the premises, the undersigned hearing officer now makes the following findings of fact and conclusions of law and enters the following decision.

FINDINGS OF FACT

1. Petitioner is a [REDACTED] girl who is [REDACTED]

[REDACTED]
[REDACTED] Petitioner lives at home with her mother, her grandmother and a

sibling. Her intellectual functioning has been assessed on the level of a 6 month old child.

2. Petitioner has been receiving services from the Respondent School District since age [REDACTED]. From the time Petitioner began receiving services in the 2002-03 school year, the Respondent School District developed an Individual Family Service Plan and Petitioner received special education services which recognized her then-present level of performance. Goals were developed for Petitioner which included stimulation, feeding, occupational therapy, physical therapy and speech therapy. Petitioner was provided services at a private foundation for blind children with whom Respondent School District contracted. Petitioner received services from the private foundation during the summer of 2003 and she returned there for the 2003-04 school year.

3. Because Petitioner was turning [REDACTED] years old in [REDACTED] 2004, the Respondent School District began planning a kindergarten program for her for the 2004-05 school year. To that end, evaluations were performed, meetings were held to assess Petitioner's present level of performance and additional meetings were held to create an IEP for Petitioner for the 2004-05 school year.

4. In the assessment of Petitioner's present levels of performance, the private foundation for blind children noted that "Petitioner [name deleted] is a terrific little girl who seems to be able to give delayed visual responses to familiar objects when she is alert and aware of her surroundings. Positioning is critical to establish optimum

conditions for her visual attention. Her preferred head position seems to be lowered and turned toward the left. Raising her head appears to be somewhat laborious for her [REDACTED] Maintaining her head in an upright position seems to tire her quickly. Petitioner [name deleted] seems to respond well to familiar items, people and events that are part of her routine (e.g. favorite toys, teacher and teacher aides, circle time, and music). She seems to visually respond and reach for favorite toys or other familiar items. Petitioner [name deleted] appears to visually respond when objects, events, or people are in close range. She appears to have a preference to objects/lights presented on her right side. Petitioner [name deleted] is sensitive to light as observed in outdoor environments and she does appear to prefer artificially well lit environments. It is the opinion of the evaluator that Petitioner's [name deleted] vision adversely affects her learning and she should continue to receive the services of a teacher of the visually impaired". The evaluator noted "Petitioner [name deleted] moves her hands slightly to briefly explore objects that are touching them. She smiles when she is happy and vocalizes during independent playtime. Petitioner [name deleted] consistently makes choices with occasional physical assistance at circle time and seems to be aware when it is her turn. Once Petitioner [name deleted] has 'looked', she will turn her head away from a switch/toy to activate or interact with it. Petitioner [name deleted] shows anticipation of classroom activities by smiling and occasionally vocalizing. Petitioner [name deleted] works well in

groups and has good waiting skills". The evaluator noted that Petitioner enjoys other children in class, that she smiles at the adults in the classroom, that she loves being held and that she relaxes when being talked to in a calm voice.

5. The evaluator also noted that "Petitioner's [name deleted] feeding has been a constant challenge all year. Her tone overall is high which effects (sic) her coordination of a successful swallow. She is receiving her primary nutrition orally

[REDACTED] and, it is our understanding, at home through a bottle with a hole cut in the nipple.

Petitioner [name deleted] has an allergy [REDACTED] and has been noted to react with an increase in temperature that causes her skin to blush and become blotchy".

Additionally, the evaluator noted that "Petitioner [name deleted] [REDACTED]

[REDACTED] to decrease this behavior and minimize/eliminate injury. Petitioner [name deleted] also wears a brace on her [REDACTED] arm to keep her hand away from her mouth. The brace allows her to use her hand [REDACTED] however, her range of motion is greatly decreased.

Petitioner's [name deleted] fingernails can be very long at times, which can possibly create an even greater injury to her face".

6. The evaluator made recommendations for Petitioner's kindergarten education. They were: "1). Petitioner [name deleted] receive extensive direct and consultative physical, occupational and speech therapy to improve current levels of functioning; 2). Petitioner [name deleted] would benefit from a sensory integration

approach to help her increase her interest in her surroundings; 3). Petitioner [name deleted] has many physical needs that must be met. She would most likely do well in a classroom with a small teacher/student ratio, and one thing that is equipped to deal with her needs, both in terms of physical needs, such as positioning, feeding and stimulation, but also her emotional needs of encouragement and positive reinforcement; 4). Petitioner [name deleted] continue to receive the services of a teacher of the visually impaired to continue assessing her functional vision and to encourage visual behaviors”.

7. Petitioner’s speech and language therapy, physical therapy as well as her occupational therapy level of performances were assessed and recommendations were made to continue speech & language, physical and occupation therapy services.

8. Based on the assessments and recommendations of Petitioner’s pre-school placement, the IEP team met on May 4, 2004 to create an IEP for the 2004-05 school year. Petitioner’s disabilities were noted, her present levels of performance were addressed and goals/objectives were developed, which goals included functional skills/cognitive awareness. The IEP developed objectives for meeting her goals, objectives for feeding and the IEP included support services such as speech & language, occupational therapy and physical therapy. The IEP team proposed to provide special education services for Petitioner in a self-contained program at its specialized Academy, AHA [name deleted].

9. AHA is a specialized campus for students in the Respondent School District who are emotionally disabled (ED), moderately developmentally disabled, severely developmentally disabled and those students, [REDACTED]

[REDACTED] The campus also has several pre-school classes and a Head Start program class on the AHA campus.

10. The [REDACTED] class at the AHA campus has approximately [REDACTED] students. The class has a teacher and 4 aides, three of whom are licensed as Certified Nursing Assistants (CNAs) by the State Nursing Board. Additionally, the [REDACTED] class is visited by an Occupational Therapist once a week, a Certified Occupational Therapist Assistant (COTA) comes twice a week, an adaptive PE teacher comes to the room, a physical therapist comes to the room and a speech & language therapist comes to the room. Also, for those [REDACTED] students who are visually impaired, the District contracts with the Foundation for Blind Children to provide itinerant services at the AHA campus.

11. Petitioner's grandmother/guardian visited the [REDACTED] classroom on the AHA campus in the spring of 2004. At that time, the class was moving to another classroom and a large number of pieces of therapy equipment were boxed for transfer, other equipment was in boxes and there were three students in the classroom. Petitioner's grandmother/guardian was told that the [REDACTED] program would be moving to another classroom and that, for the 2004-05 school year, the program would have a new teacher.

12. At the May 4, 2004 IEP meeting, Petitioner's grandmother/guardian refused placement at the AHA campus and she did not sign the IEP. Petitioner's grandmother/guardian told the conference attendees that she wanted the Respondent School District to place Petitioner at a private special needs school or to provide home-based education.

13. Petitioner's grandmother/guardian met with the Respondent School District's Special Education Director and she told him that she did not want Petitioner attending class at the AHA campus because she feared for Petitioner's safety in that the campus is shared with emotionally disabled (ED) students who could harm Petitioner if the ED students became violent.

14. The emotionally disabled students on the AHA campus are separated from other students, they are closely supervised and they participate in structured programs. Emotionally disabled students who travel around the campus are accompanied by an adult and there have not been any incidents between emotionally disabled students and non-emotionally disabled students on the AHA campus.

15. At times, one or two emotionally disabled students on the AHA campus come to the [REDACTED] classroom to read to the students. At such times, they are escorted and supervised by an adult. There have not been any incidents between emotionally disabled students and [REDACTED] students on the AHA campus.

16. Petitioner participated in the Extended School Year program during the

summer of 2004 and the Respondent School District expected that Petitioner would be enrolled in the [REDACTED] program for the 2004-05 school year. Instead, Petitioner's grandmother/guardian did not enroll Petitioner in the Respondent School District for kindergarten.

17. For the 2004-05 school year, the [REDACTED] on the AHA campus of the Respondent School District has [REDACTED] students enrolled in the class (actual attendance each day varies depending on each child's physical condition and ability to attend school). The class is taught by a teacher who has 4 aides, three of whom are CNAs and a school nurse is available throughout the day. Specialized therapy equipment is available for the students, a separate area for changing the students is screened off from the classroom, privacy screens are present in the classroom and the students have a daily routine which includes feeding and class time.

18. Petitioner's grandmother/guardian was invited to observe the [REDACTED] classroom in the early fall of 2004 but she declined the offer.

19. On October 7, 2004, Petitioner's grandmother/guardian submitted a due process hearing request, seeking placement at the Upward Foundation's School for Children with Special Needs which she described as "They specialize in feeding issues, they have current (modern) sensory equipment and classrooms are defined by age groups and developmental levels". In support of her due process hearing request, Petitioner's grandmother/guardian wrote "Petitioner's [name deleted] medical and physical condition requires that she receive total care assistance at all

times. I believe that Petitioner's [name deleted] safety and educational needs are not being met due to the following.." and she identified five areas where she thought that the Respondent School District's IEP was deficient. They are: "1) children with behavioral issues have access to children without behavioral issues; 2) class is not kept clean and smells of urine; 3) total care children have been observed being changed without privacy; 4) Petitioner [name deleted] needs specialized assistance while feeding due to aspiration during feeding; and, 5) lacks modern therapy equipment".

20. An evidentiary hearing was then scheduled to consider Petitioner's grandmother/guardian's due process hearing request and such hearing was held on December 6, 2004 at the Respondent School District.

21. No competent evidence exists in the record of this matter to show that, during the 2004-05 school year, any [REDACTED] student at the AHA campus has suffered a loss of privacy while being changed. Further, evidence was produced to show that the [REDACTED] staff protect students' privacy.

22. No competent evidence exists in the record of this matter to show that, during the 2004-05 school year, the [REDACTED] classroom at the AHA campus has any lingering urine smell or that any noxious odor exists at all in that classroom.

23. Insufficient credible evidence exists in the record of this matter to show that the [REDACTED] classroom at the AHA campus lacks any therapy equipment needed for the students, that any therapy equipment is outdated, that any therapy equipment

is outmoded or that any therapy equipment is unable to provide educational benefit to the students in the [REDACTED] classroom.

24. No competent evidence exists in the record of this matter to show that any student in the [REDACTED] classroom at the AHA campus is subject to predation or harm by other students on that campus and no evidence exists to show that any [REDACTED] student has ever been harmed or threatened by any other student on that campus.

25. No evidence exists in the record of this matter to show that the personnel employed by the Respondent School District to work in the [REDACTED] classroom are unable or unwilling to provide Petitioner with adequate safeguards during feeding to prevent aspiration or choking.

CONCLUSIONS OF LAW

1. Petitioner is entitled to a free, appropriate public education within the least restrictive environment.

2. All due process rights to which Petitioner and her grandmother/legal guardian are entitled have been provided.

3. All notice requirements to which Petitioner and her grandmother/legal guardian are entitled have been provided by the Respondent School District.

4. Petitioner is entitled to receive special education services based on [REDACTED]

[REDACTED]

5. Respondent School District has prepared and offered to Petitioner's grandmother/guardian an IEP with goals and objectives that are designed to offer educational benefit to Petitioner in a placement that is adequate to provide such educational benefit.

6. The Respondent School District's offered placement includes skilled personnel to provide educational benefit to Petitioner.

7. The Respondent School District's offered placement includes physical facilities to ensure Petitioner's privacy.

8. The Respondent School District's offered placement includes sufficient therapy equipment, in both quantity and quality, to provide educational benefit to Petitioner and to satisfy the requirements for related services in the proposed IEP.

9. The Respondent School District's offered placement includes itinerant support for Petitioner's visual impairment to be able to provide educational benefit in accordance with the proposed IEP.

10. The Respondent School District's offered placement includes a classroom environment that is safe for Petitioner.

11. The Respondent School District's offered placement will provide Petitioner with special education services in accordance with the requirements of a free, appropriate public education (FAPE) in the least restrictive environment.

12. Respondent School District is the prevailing party in this due process

action.

HEARING OFFICER'S DECISION AND ORDERS

It is the decision of the undersigned hearing officer that the Respondent School District's program at its AHA campus [name deleted] provides a free, appropriate public education to Petitioner in the least restrictive environment, that the IEP developed for Petitioner for the current school year is appropriate for Petitioner and that the IEP developed by the Respondent School District is calculated to provide educational benefit to Petitioner. Petitioner's due process hearing requests are denied. Petitioner's grandmother is directed to immediately enroll Petitioner in the proposed Respondent School District placement and to sign her assent to the Respondent School District's proposed IEP. Respondent School District is the prevailing party in this action.

Unquestionably, Petitioner's grandmother/guardian is motivated by the most noble maternal instincts to make sure that her granddaughter is safe at school. Petitioner's grandmother insists that a private specialized program for Petitioner is superior to the program offered by the Respondent School District because, at the Respondent School District's program, Petitioner would not be safe, she would be subject to the depredation of emotionally disabled students who share the same campus and she would not be provided the quality of a special education program

to which she is entitled.

Unfortunately, Petitioner's grandmother/guardian's perceptions of the Respondent School District's program for Petitioner are prejudiced by two factors – her own grandson's emotional disability and her spring 2004 visit to the [REDACTED] classroom. Because of her grandson's disability, Petitioner's grandmother/guardian has generalized that all ED students on the AHA campus are prone to indiscriminate violence and she worries that her helpless granddaughter will be caught in a maelstrom of mayhem on a Columbine level. She also believes that, based on her spring 2004 classroom visit, the Respondent School District is incapable of providing FAPE for Petitioner.

Petitioner's grandmother's visit to the classroom in the spring of 2004 was not representative of the [REDACTED] classroom in which Petitioner would be receiving an education during the current school year. The classroom was relocating to another room and most of the supplies, equipment and materials had been boxed in preparation for the move. As Petitioner's grandmother aptly pointed out, the room was "sterile". The actual [REDACTED] room for the 2004-05 school year is far different than what Petitioner's grandmother saw. The room is vibrant, full of therapy equipment, loaded with adults and seemingly, a fun place to be for the students. Whatever qualms Petitioner's grandmother had when she saw the old room, the actual classroom is an environment into which Petitioner could be easily immersed. Whatever misgivings Petitioner's grandmother may have had about the quality of the

staff, she could have alleviated her concerns with a follow-up visit in the fall (an invitation she chose to decline). Had she gone to the classroom in the fall, she would have seen how the adults respect the students' privacy, she would have seen the care and attention paid to students' feeding time, she would have seen the array of quality therapy equipment and she would have been able to converse with the teacher, the classroom aides/nursing assistants, the occupational therapist and she could have appreciated the classroom environment's hygiene practices.

On an objective basis, there is no real basis for Petitioner's grandmother's declaration that the [REDACTED] program at the AHA campus is deficient or defective. However, this due process hearing request is not founded on rebuttable objections – it was spawned by fear and it is being perpetuated by distrust. It is entirely too facile to blame the AHA environment as the basis for contesting the Respondent School District's offered placement, especially in light of the total absence of **any** incidents between ED students and non-ED students. Petitioner's grandmother has firsthand experience with an ED grandson who was placed at the AHA campus. She worries that all of the ED students on campus are potential killers and that all of them have violent tendencies. As she said, if a student goes "berserk", her helpless granddaughter would be subject to harm. Since Petitioner's grandmother does not know any of the students (or about the programs in which they are placed), she has generalized to her grandson's behavior, all to the detriment of Petitioner's kindergarten experience.

It is understandable that Petitioner's grandmother would be affected about Petitioner's safety; Petitioner is a very fragile [REDACTED] It is understandable that Petitioner's grandmother would be protective about Petitioner; Petitioner is completely unable to take care of herself. It is understandable that Petitioner's grandmother needs to shield Petitioner; the natural parents are unable to nurture Petitioner. It is natural for Petitioner's grandmother to want to be confident about Petitioner's safety and not worry whether an ED student goes "berserk".

However, with all of that innate caution, with all of that enveloping protection and with all of the need for succor, Petitioner's grandmother's hostility towards the Respondent School District's [REDACTED] program is unwarranted. Even Petitioner's grandmother admitted "it's a big might, a big if" about an ED student harming another student but her conclusion that "you don't know what would trigger a child off" is not reasonable when considering whether Petitioner should attend the [REDACTED] program in the Respondent School District.

There are no recorded incidents of havoc wrought by an ED student on the AHA campus and the likelihood of **any** contact between an unsupervised ED student and Petitioner is virtually non-existent. Indeed, other than outright speculation and imaginary dread, Petitioner's grandmother has no basis for her anxiety. Petitioner's grandmother believes that school personnel don't care about the students enough to protect them but that belief has no more foundation than her other contentions about safety.

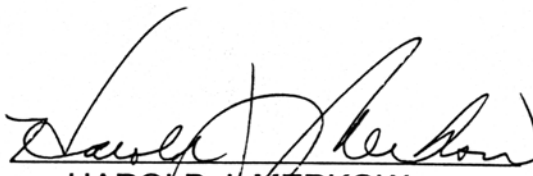
Indeed, the program suggested by Petitioner's grandmother/legal guardian is no more secure than the [REDACTED] program on the AHA campus. All of Petitioner's grandmother's fears would be as extant at the Upward Foundation as at AHA and the appropriateness of the Upward Foundation program for Petitioner is no different than the [REDACTED] program. The only thing that distinguishes the Upward Foundation program is that it is not the [REDACTED] program.

Based on the evidence presented in this hearing, the Respondent School District's [REDACTED] program proposed for Petitioner meets the legal requirements for educational benefit, the IEP is detailed and appropriate to address Petitioner's special education needs and the environment in which Petitioner's special education program will be provided is both safe and beneficial. Based on the evidence presented in this hearing, Petitioner's grandmother's objections to the IEP and the placement are not borne out by the facts and her due process complaint cannot be sustained. Petitioner's grandmother must enroll Petitioner in the [REDACTED] program immediately to prevent further relapse by Petitioner.

APPEAL RIGHTS

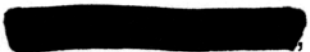
THIS DECISION IS A FINAL DECISION. Any party aggrieved by this decision may file an appeal with the Arizona Department of Education, Exceptional Student Division, 1535 West Jefferson, Phoenix, Arizona, within thirty-five (35) days following your receipt of this decision.

DATED this 17th day of December 2004.



HAROLD J. MERKOW
Due Process Hearing Officer

DUPLICATE ORIGINALS SENT TO:

, Petitioner's grandmother/legal guardian
Denise Bainton, Attorney for Respondent School District